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NOTES.

ADMISSIONS OF A PARTNER AFTER FIRM DISSOLUTION.—It is uniformly held that the admissions of a partner concerning partnership affairs and in the ordinary course of business, are receivable in evidence against the firm, if made during its continuance, *Randall* v. *Knevals* (1898) 27 App. Div. 146; aff'd (1900) 161 N. Y. 632; *Western Assurance Co.* v. *Towle* (1886) 65 Wis. 247, upon the theory either that partners are mutual agents, Wigmore, Evid. § 1078; Bates, Partn. § 333; *Webster* v. *Stearns* (1863) 44 N. H. 498, or parties in joint-interest. *Munson* v. *Wickwire* (1852) 21 Conn. 513; *Catt* v. *Howard* (1820) 3 Starkie 3. But the rule as to admissions made after dissolution is much controverted. Parsons, Partn. (4th Ed.) 161, n.; Wigmore, *supra*, § 1280, n. 7. The conflicting authorities are usually grouped under two opposed cases: see Burdick, Partn. (2nd Ed.) 247; Bates, *supra*, 699:—*Wood* v. *Braddick* (1808) 1 Taunt. 104, declaring competent as against A, partner B's admissions after dissolution, concerning an engagement entered before dissolution; *Hackley* v. *Patrick* (N. Y. 1808) 3 Johns. 536, in broad terms holding them incompetent. The latter view may fairly be termed the "New York rule" because of its origin and reiteration in that state. *Baker* v. *Stackpole* (1827) 9 Cow 420;

Hart v. *Woodruff* (1881) 24 Hun 510; *Pringle* v. *Leverich* (1884) 97 N. Y. 181; *Mackintosh* v. *Kimball* (1905) 101 App. Div. 494.

Curiously, each group considers only one aspect of the partners' dual relation. The *Wood* v. *Braddick* group, *supra*, bases its rule upon joint-interest, regarding as unaffected by dissolution the partners' original joint-interest in the previously created rights and obligations. *Parker* v. *Merrill* (Me. 1829) 6 Greenl. 41, 43; *Bispham* v. *Patterson* (1840) 2 McClean 87, 89. But since, under any joint-relation, admissions of B cannot charge A, unless their joint-interest has already been established, *Alcott* v. *Strong* (1852) 9 Cush. 323; Greenleaf, Evid. (16th Ed.) § 177, the rule of *Wood* v. *Braddick* should apply only where the subject of the admission has first been *aliunde* proved a partnership affair. *Cady* v. *Shepherd* (1831) 11 Pick. 400; *Pennoyer* v. *David* (1860) 8 Mich. 407. On this ground the result in *Hackley* v. *Patrick*, *supra*, might be justified. The force of the restriction becomes most apparent in actions where A pleads that the firm obligation alleged was really the individual contract of B, who made the admission. Cf. *Willis* v. *Hill* (N. C. 1837) 2 Dev. & B. L. 231. This limitation does not conflict with the other rule that B's declarations before dissolution at the time of procuring a loan, actually for himself, are competent to show that credit was given to the firm, *Smith* v. *Collins* (1874) 115 Mass. 388; *Tremper* v. *Conklin* (1870) 44 N. Y. 58; for borrowing money lies within the scope of a trading firm during its continuance. Burdick, *supra*, 188, and such statements must be regarded as inducement to a contract within the apparent authority of the declarant. *Benninger* v. *Hess* (1884) 41 Oh. St. 64; cf. *Union Nat'l Bank* v. *Underhill* (1886) 102 N. Y. 336. Similar declarations subsequent to the transaction would not charge the firm. *White* v. *Gibson* (N. C. 1850) 11 Ired. L. 283; *Klock* v. *Beekman* (1879) 18 Hun 502 (dissenting opinion). A second restriction on the rule in *Wood* v. *Braddick*, *supra*, is that the admission must be made in the course of the winding-up; otherwise the scope of admissibility would be wider than under the accepted rule as to admissions made before dissolution. *Supra*; *Boor* v. *Lowrey* (1885) 103 Ind. 468. This limitation seems logically inconsistent with the usual statement of the doctrine concerning admissions of parties in joint-interest, *Walling* v. *Rosevelt* (1837) 16 N. J. L. 41; *Bank of U. S.* v. *Lyman* (1848) 20 Vt. 666, 671; Wigmore, *supra*, § 1077, but is reasonable and has been recognized in the present British Partnership Act (1890) § 15, which purports merely to declare *Wood* v. *Braddick*. Lindley, Partn. (7th Ed.) 842, 148.

In New York, admissions of one party in joint-interest are receivable against another only when there exists mutual authority, express or implied. *Wallis* v. *Randall* (1880) 81 N. Y. 164. But even from the standpoint of agency—the sole aspect considered in the second group, *supra*—the New York rule, *supra*, it is submitted, is too broad. It wrongly assumes the agency of the partners totally ended by dissolution. Abundant authority is not wanting, even in New York, that no complete revocation occurs. *Gates* v. *Beecher* (1875) 60 N. Y. 518, 524. Disregarding situations peculiar to dissolution caused otherwise than by agreement,—though, broadly speaking, partners may after dissolution no longer bind the firm by new con-

tracts, rights and obligations previously created persist. Thus, in the absence of contrary agreement, every member retains implied power to execute outstanding engagements, *Western Stage Co.* v. *Walker* (1856) 2 Ia. 504, to adjust claims against the firm; *Tutt* v. *Cloney* (1876) 62 Mo. 116, and to collect and receipt for money due. *Gillilan* v. *Ins. Co.* (1869) 41 N. Y. 376. So far are the partners from becoming mere strangers, that a demand on one member of a dissolved firm of makers suffices to charge the indorser of a note. *Gates* v. *Beecher, supra.* Even, therefore, if partners be considered without power to bind each other unless as agents, the true rule, it is submitted, requires that such admissions, made after dissolution, be received against the firm as amount to words and acts fairly within the scope of the authority retained, and in the ordinary course of the winding-up. See Burdick, *supra,* 248; Parsons, *supra,* § 128. Since the partners' agency after dissolution is confined to operations normally essential to final settlement, *Hall* v. *Lanning* (1875) 91 U. S. 160, the scope of admissibility under this rule would of course be narrow. Thus, there would still be excluded as against the partner not making the admission:— a deposition that a contract sued on by the firm had been satisfactorily performed, *Iron Co.* v. *Cohen* (1903) 113 Ill. App. 30; admissions converting an account current into an account stated, *Hart* v. *Woodruff, supra,* since stating an account gives a new cause of action, (see Bates, *supra,* 737, justly criticising *Buxton* v. *Edwards* (1883) 134 Mass. 567); loose declarations, years after dissolution, that certain goods had been delivered to the firm, *Chardon* v. *Oliphant* (S. C. 1813) 3 Brev. 183; and acknowledgments of firm debts barred by the statute of limitations, since under the modern view of that statute, see *Van Keuren* v. *Parmalee* (1849) 2 N. Y. 523, the promise of payment implied, though based on the old consideration, is a new contract. *Wilson* v. *Torbert* (Ala. 1831) 3 Stew. 296. Nevertheless, the rule would at least cover, for example, an acknowledgment of debt while engaged in adjusting the unsettled business, *Feigley* v. *Whitaker* (1872) 22 Oh. St. 606, and declarations contemporaneous with receiving payment of a firm credit. *Kirk* v. *Hiatt* (1850) 2 Ind. 322 (*semble*).

Tested by the foregoing principles, a recent West Virginia decision seems questionable. *Burdett* v. *Greer* (W. Va. 1908) 60 S. E. 497. In an action against A and B, partners, (later abated as to A) for work performed under a contract *aliunde* proved to have been formed before dissolution, A's acknowledgment of the amount due, made during a settlement after dissolution, was held inadmissible. The court reasoned from the well-settled law that a partner may not after dissolution deliver a firm note, *Abel* v. *Sutton* (1808) 3 Esp. 108; *Gale* v. *Miller* (1874) 54 N. Y. 536, or even renew old paper, *Nat'l Bank* v. *Norton* (1841) 1 Hill 572; *Hurst* v. *Hill* (1855) 8 Md. 399. But the basis of this doctrine is not, as assumed, that such acts make new evidence, see *Parker* v. *Merrill, supra,* but that they create new contracts. Burdick, *supra,* 245. That the sum due in the principal case was wholly for work done since the dissolution seems immaterial; for the Court conceded that the entire contract survived.

The validity of the suggested modification of the New York rule seems

to have been recognized even in a relatively late dictum of the New York Court of Appeals, *Nichols* v. *White* (1881) 85 N. Y. 531, 536, and it has been embodied in the proposed American Partnership Act, Reports of Amer. Bar Ass'n, (1906), Pt. II, 440, §§ 14, 38, though the existing rule is probably sanctioned by the weight of American authority. 22 Am. & Eng. Encyc. L. (2nd Ed.) 217. The argument that any rule other than broad exclusion is dangerous because ill-feeling often follows partnership dissolution, cf. *Gleason* v. *Clark* (1828) 9 Cow. 57, 59, should go to the weight and not to the competence of such admissions. Cf. *Western Assurance Co.* v. *Towle, supra,* 256; *King* v. *Hardwick* (1809) 11 East 578, 586. The present New York rule may be of easier application; but the consequent reduction of opportunity for reversible trial error hardly justifies divergence from principle.

EQUITABLE JURISDICTION OF MUTUAL ERROR OF LAW.—Courts are in substantial accord upon two aspects of this subject. First, mutual mistake of foreign law is relievable. Such error, while almost universally regarded as pure error of fact, Kerr, Fraud and Mistake (2nd Ed.) 466; *Imperial etc. of Trieste* v. *Funder* (1872) 21 Week. R. 116, is as genuine mistake of law as mistake of the *lex fori.* The true basis—that the ignorance concerns that which the individual is excusable for failure to know—has apparently been overlooked. Second, in compromises the existence of mistake, properly so-called, is manifestly impossible. Both parties have done just as intended, namely, to assume the contingency of gaining or losing by the arrangement according as the law should prove. *Hall* v. *Wheeler* (1887) 37 Minn. 522. Family settlements, in so far as they involve this element, proceed upon the same principle. *Burnes* v. *Burnes* (1904) 132 Fed. 485. It has been suggested, without attempt at definition of the language employed, that when both parties to the compromise mistake a "plain and settled principle of law" relief should be granted. Sir John Leach in *Naylor* v. *Winch* (1824) 1 Sim. & Stu. 555. 564. This distinction, it is submitted, is not only unsupported by authority, cf. *Faust's Adm'x* v. *Birner* (1860) 30 Mo. 414, but logically unsound, for the error is less excusable and *pari passu* more reprehensible than where a dubious and disputed rule is in question. Cf. *Good* v. *Herr* (Pa. 1844) 7 Watts & S. 253. The substantial recognition of these principles, unsettled as they still are in some respects, is in striking contrast with the numerous conflicting views of the proper jurisdictional test for error of law in general.

Where the written instrument, from error as to the legal effect of the language used, fails to express the intention of the parties, for example, where a scrivener misuses technical terminology, *Hunt* v. *Rousmanier* (1823) 8 Wheat. 174; (1828) 1 Pet. 1, or errs in the legal force of a description, *Pitcher* v. *Hennessey* (1872) 48 N. Y. 415, and the parties accept the document under the belief that it sets forth their bargain, the weight of judicial authority and the majority of text writers, Pomeroy, Eq. Jur., §§ 843, 845; Story, Eq. Jur., § 114, insists that "equity will grant relief * * * and it matters not whether such mistake be called one of law or fact." Beach, Mod. Eq. Jur., 540; cf. *Canedy* v. *Marcy* (Mass. 1859) 13 Gray 373.